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Supreme Court, U.S.
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No. 96-202

In The

Supreme Court of the United States

October Term, 1995

MARION URICHICH AND HELEN URICHICH,

Petitioners,

vs.

CITY OF YOUNGSTOWN AND ROCCO RUSSO,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does Ohio Civil Rule 56 titled "Summary Judgment" violate a citizen's right to a trial by jury or is it a viable tool to end litigation when there is an absence of material facts concerning the essential elements of the case?

LIST OF INTERESTED PARTIES

The Petitioners are Marion Urichich and Helen Urichich.

The Respondents are The City of Youngstown and Rocco Russo.

Each of the Respondents join in this Brief in Opposition.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request the Court deny the petition for Writ of Certiorari seeking review of the Supreme Court of Ohio 95-2258, 1996, term which declined jurisdiction and dismissed the appeal as not involving any substantial constitutional question.

STATEMENT OF THE CASE

Respondents respectfully oppose the petition for Writ of Certiorari based on the unquestionable validity of Ohio Civil Rule 56 which patterns Federal Rule 56.

On June 6, 1991, a civil complaint for damages was filed on behalf of Petitioners against Respondents.

On June 28, 1991, Respondents answered and on April 28, 1992, a Motion for Summary Judgment was filed on behalf of the Respondents.

Respondents' Motion for Summary Judgment was granted by the trial court and an appeal was taken to the Seventh District Court of Appeals. The Court of Appeals found Petitioners' arguments to be without merit and the judgment of the trial court was affirmed.

On March 6, 1996, the Ohio Supreme Court through an entry stated:

> "Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question."

On March 10, 1987, the Respondent, Rocco Russo, an employee of the City of Youngstown, driving a city fire truck within the scope of his employment damaged the real property of the Petitioners responding to an emergency.

The truck, driven by the Respondent, proceeded to a fire by way of Dewey Avenue where its speed never exceeded the posted speed limit. When the truck reached the top of Dewey, its speed was between 30 and 35 miles per hour. (Russo depo. p. 93)

The truck proceeded down Dewey where it reached a cement divider separating the lanes of travel. Captain Simmerlink, of the Youngstown Fire Department seated next to the Respondent, stated the truck's speed at the divider was between 10 and 15 miles per hour. Captain Simmerlink also stated that as the truck reached the end of the divider, it was travelling at 5 to 10 miles per hour. (Simmerlink depo. pp. 56, 59)

When the truck reached Poland Avenue at the bottom of Dewey Avenue, Respondent could not turn the truck with safety. The truck proceeded across Poland Avenue into a parking lot where it made contact with Petitioner's building. At the time of the impact, the truck was travelling less than 2 miles per hour. (Simmerlink depo. p. 61)

ARGUMENT

Ohio Revised Code Section 2744.00 titled "Political Subdivision Tort Liability" governs the law to be applied.

Ohio Revised Code Section 2744.01(A) defines an emergency call as:

> "A call to duty including, but not limited to, communications from citizens, police dispatches and personal observations by peace officers or inherently dangerous situations that demand an immediate response on the part of a peace officer."

Furthermore, Section 2744.02(B) states:

> "Except as otherwise provided in this division, political subdivisions are liable for injury, death or loss to persons or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. The following are full defenses to such liability:
>
> > (b) A member of a municipal corporation, fire department or any other fire fighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress *or is believed to be in progress,* or in answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct.

Willful or wanton misconduct has been defined in *Peoples v. Willoughby,* 70 Ohio App. 3d 848 (1990).

In *Peoples,* the Court stated:

> " 'Wanton misconduct' comprehends an *entire absence of all care* for the safety of others and an indifference to consequences. * * * *It implies a*

> *failure to exercise any care toward those to whom duty of care is owing when the probability that harm will result from such failure is great,* and such probability is known to the actor. It is not necessary that an injury be intended or that there be any ill will on the part of the actor toward the person injured as a result of such conduct. * * * Wanton misconduct is positive in nature while mere negligence is naturally negative in character." Emphasis added.

In addition, the *Peoples* Court defined willful misconduct as:

> " * * * something more than negligence. 'Willful misconduct' imports a more positive mental condition prompting an act than does the term 'wanton misconduct.' 'Willful misconduct' implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or *purposely doing wrongful acts with knowledge or appreciation* of the likelihood of resulting injury. * * * The word 'willful' used in the phrase, 'willful misconduct', implies intent, but the intention relates to the misconduct and not merely to the fact that some specific act, such as operating an automobile, was intentionally done. * * * The intention relates to the commission of wrongful conduct, independent of the intent to use certain means with which to carry out such conduct." Emphasis added.

Therefore, the issue presented by Petitioners is whether the Court's application and the validity of Civil Rule 56 titled "Summary Judgment" is a valid tool to end litigation.

The Ohio Supreme Court in *Dresher v. Burt*, 75 Ohio St. 3d 280 (1996) using *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) set the standards for a Rule 56 pleading and said issue does not need to be revisited by this Court.

The Ohio Supreme Court using *Celotex* made clear that the moving party bears the responsibility of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim.

The Supreme Court went on to state:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In the present case, Petitioners failed to meet their burden as determined by the trial court and Court of Appeals and judgment was entered accordingly.

Lastly, in reference to Moore's Federal Practice

> "Whether operating broadly or on a more limited scale the summary judgment procedure is not a substitute for a court or jury trial, as the case may be, of any issue of material fact that is the subject of a genuine dispute. Moore's Federal Practice A S56.04(1), 56.15(1), 56.17(18), 56.18, 56.19 56.20. For this reason, the summary

> judgment procedure does not invade the right of trial by jury in a jury action. Moore's Federal Practice S56.06.

Therefore, a trial was unnecessary because there is no genuine issue as to any material fact, and on the established facts the Respondents were entitled to a judgment as a matter of law.

Pursuant to the United States Supreme Court Rule 15.1, Respondents bring the following misstatements of facts contained in the petition to the Court's attention.

Petitioner in his question presented for review claims that he has a guaranteed fundamental right to trial by jury making Rule 56 an unconstitutional practice. Unquestionable, said statement is an untruth. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Petitioner misrepresents to this Court that counsel did not serve Petitioner with a copy of its Brief to the Ohio Supreme Court. As shown in Petitioner's own Brief, service was made to him on August 2, 1996. Further Respondents' Brief is neither made up of lies or half-truths nor was there an attempt to mislead the Supreme Court of Ohio.

The Supreme Court of Ohio simply declined jurisdiction and dismissed Petitioner's appeal as not involving any substantial constitutional question which this Court should follow.

Petitioner misleads this Court by stating that the conduct of the Respondent Rocco Russo constituted willful or wanton misconduct.

Petitioner's entire brief is made up of mere allegations with no specific facts showing that a genuine issue of material fact existed for trial. Therefore, Rule 56 was the appropriate tool to end said litigation.

CONCLUSION

The claim of Petitioners is simply that Ohio Civil Rule 56 and Federal Rule 56 of Practice are unconstitutional and cannot be a tool to end litigation.

Ohio case law and prior decisions of this Court are clear that Rule 56 is a viable alternative for cases which have no genuine issue as to any material fact and that on the established facts the movant is entitled to judgment as a matter of law.

To allow Petitioner's Writ, this Court calls into question the validity of Rule 56 where no question exists.

Wherefore, Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

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THE SUPREME COURT OF OHIO

1996 TERM

To wit: March 6, 1996

Marion Urichich et al., Appellants,	:	Case No. 95-2258
v.	:	ENTRY
City of Youngstown, Ohio, et al., Appellees.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Marion Urichich.

(Mahoning County Court of Appeals; No. 93CA221)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice